17073

No. 148.

Brf. of Bonestell

Office Supreme Court U.S.
FILED
JAN 16 1901
JAMES H. MCKENNEY,
Clerk.

Filed Jan. 16, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1900.

No. 148.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

vs.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR

C. K. BONESTELL,
ATTORNEY FOR DEFENDANT IN ERROR.

(17,533.)

FILED DECEMBER 1900.

17074

In the Supreme Court of the United States.

JACOB GARDNER and PETER GARDNER,
Plaintiffs in Error,

vs.

C. K. BONESTELL, Executor, &c.,
Defendant in Error.

Brief of Defendant in Error.

The question involved in this action is one of boundary alone and this Court has no jurisdiction.

Almonester *vs.* Kenton, 9th How., U. S., 1.
Lanyear *vs.* Henley, 4 Wall., U. S., 204.
Dower *vs.* Richards, 151 U. S., 658.

Three questions were involved in the contest before the Land Department, all questions of fact: (*a*) Was the land in controversy ever within the grant to Read; (*b*) Was Throckmorton a purchaser in good faith and for valuable consideration within the meaning of the act of July, 1866 (14 Stat., p.218); (*c*) Had Wormouth complied with the law so as to be entitled to his patent. All of

these were disputed questions of fact and their determination by the Land Department was conclusive.

Moreland *vs.* Page, 20 Howard, U. S., 522.
Aurora Hill Mining Co., *vs.* Sts. Mining Co., 34 Fed. Rep., 575.
Pelluride Mining Co. *vs.* Rio Grande Ry. Co., 175 U. S., 639.
Craig *vs.* Leitersdorfer, 123 U. S., 189.

A Court of equity can only interfere when it is clear that the officers of the Land Department have by a mistake of law, given to one man the land which on undisputed facts belongs to another. And where there is a question of fact, or a mixed question of law and fact, and the Court cannot so separate it as to see clearly where the mistake is, the decision of the tribunal to which the law has confided the matter is conclusive.

Marquez *vs.* Frisbie, 101 U. S., 473.
Vance *vs.* Burbank, 101 U. S., 514.

Where a survey conforms to the decree confirming the grant as nearly as practicable, the survey will not be disturbed even on direct attack.

Dehon *vs.* Bernal, 3 Wall., U. S., 774.
U. S. *vs.* Armijo, 5 Wall., U. S., 444.

The subject of surveys of confirmed land claims, is under the control of the Land Department, and its action is not subject to supervision of the Court, however erroneous.

U. S. *vs.* Flint, 4 Sawyer, 42.

It is respectfully submitted that the writ should be dismissed and the judgment of the State Court affirmed.

C. K. Bonestell,
Attorney for Defendant in Error.